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Daniel Akachukwu Agbanusi v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-322–12 OF 2015 (NGA)
ZAWAWI SALLEH, AHMADI ASNAWI AND ZAMANI A RAHIM JJCA
7 FEBRUARY 2017

C *Criminal Procedure — Trial — Miscarriage of justice — Trial judge failed to inform accused on drug trafficking charge whether his case was premised on actual or presumed trafficking — Accused also never told whether or not he had rebutted any statutory presumption invoked against him — Whether there was failure of justice and accused was prejudiced — Dangerous Drugs Act 1952*

D

The appellant was convicted and sentenced to death by the High Court on a charge of trafficking in 459.6g of methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). Customs officers on duty at the arrival hall of the Kuala Lumpur International Airport found the E drugs concealed within a laptop when they examined the contents of the appellant's luggage bag shortly after his arrival. In his defence, the appellant said that when he went to the airport carousel to collect his luggage bag he found that it had already been placed on the floor outside the carousel and although he had locked the bag, there was no sign of the lock when the customs F officers checked the bag. The appellant claimed his bag had been tampered with and that a laptop that he had in his bag and which was filled with gold dust had been replaced with the laptop containing the methamphetamine. The trial judge disbelieved the defence's story holding it to be an afterthought as the appellant never raised the matter of another laptop containing gold dust during G the prosecution's case; neither was any evidence tendered to show why anyone would have wanted to replace a laptop containing gold dust with one containing the methamphetamine. In his instant appeal against conviction and sentence, the appellant argued that his trial was marked by a failure of justice on two counts. The first was when the trial judge ruled that the appellant could not H for the first time raise the issue of the difference in the weight of the drugs during the defence's stage of the case. The second was the trial judge's failure to notify the appellant whether his case was premised on actual trafficking or presumed trafficking under the DDA. Coupled with this failure, the appellant submitted that although the presumption of possession under s 37(d) of the I DDA was never invoked against him, the prosecution erroneously submitted at the end of the trial that the said presumption was invoked and the appellant had failed to rebut it.

Held, allowing the appeal, setting aside the conviction for trafficking and

sentence of death, convicting the appellant on a lesser offence of possession under s 12(2) of the DDA and sentencing him to 20 years jail plus ten strokes of whipping:

(1) The trial judge did not make known whether the appellant's case was premised on actual trafficking under s 2 of the DDA presumed trafficking under s 37(da) and whether the appellant had rebutted the presumption. This serious infirmity was coupled with the confusion by the prosecution which submitted at the end of the defence's case that the presumption of possession under s 37(d) was invoked when it was never invoked. Based on the evidence before the court, the appellant's conviction was not safe (see paras 38–40).

(2) This court did not entertain any doubt which caused a break in the chain of evidence relating to the identity of the drugs. It was improper and unfair of the appellant to have raised and argued the issue of identity of drugs at the end of the trial. Hence, the trial judge's failure to re-consider the identity issue in his deliberation did not amount to a miscarriage of justice (see para 37).

[Bahasa Malaysia summary

Perayu disabitkan dan dihukum mati oleh Mahkamah Tinggi atas tuduhan mengedar dadah sebanyak methamphetamine 459.6g, kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pegawai kastam yang bertugas di balai ketibaan Lapangan Terbang Antarabangsa Kuala Lumpur mendapati dadah yang disembunyikan dalam komputer riba apabila mereka memeriksa kandungan beg perayu sebaik sahaja ketibaannya. Dalam pembelaannya, perayu menyatakan bahawa apabila dia bergegas ke karusel lapangan terbang untuk mengambil begnya dia mendapati yang ia telah diletakkan atas lantai di luar karusel dan walaupun dia telah mengunci beg tersebut, tidak ada bayangan kunci apabila pegawai-pegawai kastam memeriksa beg tersebut. Perayu mendakwa yang begnya telah diusik dan komputer riba yang dipegangnya di dalam beg dan yang dipenuhi dengan emas urai telah ditukar dengan komputer riba yang mengandungi methamphetamine. Hakim perbicaraan tidak mempercayai cerita pembelaan dengan memutuskan ia adalah sesuatu yang difikirkan kemudian kerana perayu tidak pernah membangkitkan perkara komputer riba yang lain yang mengandungi emas urai semasa kes pihak pendakwaan; juga tidak terdapat keterangan yang dikemukakan untuk menunjukkan mengapa seseorang hendak menukarkan komputer riba yang mengandungi emas urai dengan satu yang mengandungi methamphetamine. Dalam rayuannya ini terhadap sabitan dan hukuman, perayu berhujah bahawa perbicaaannya ditanda sebagai kegagalan keadilan atas dua perkara. Pertama adalah apabila hakim perbicaraan memutuskan bahawa perayu tidak boleh bagi kali pertama membangkitkan isu perbezaan berat dadah semasa peringkat pembelaan kes. Kedua adalah kegagalan hakim perbicaraan untuk memberitahu perayu sama ada kesnya

adalah berdasarkan atas pengedaran sebenar atau anggapan mengedar di bawah ADB. Bersama dengan kegagalan ini, perayu berhujah bahawa walaupun anggapan milikan di bawah s 37(d) ADB tidak pernah dibangkitkan tgerhadapnya, pihak pendakwaan secara salah berhujah pada akhir perbicaraan bahawa anggapan tersebut dibangkitkan dan perayu telah gagal untuk mematahkannya.

Diputuskan, membenarkan rayuan, mengetepikan sabitan bagi pengedaran dan hukuman mati, mensabitkan perayu atas kesalahan milikan yang lebih kurang di bawah s 12(2) ADB dan menghukumnya 20 tahun penjara bersama sepuluh sebatan rotan:

(1) Hakim perbicaraan tidak diberitahu sama ada kes perayu adalah berdasarkan atas pengedaran sebenar di bawah s 2 ADB anggapan mengedar di bawah s 37(da) dan sama ada perayu telah mematahkan anggapan. Kelemahan yang serius ini bertambah dengan kekeliruan oleh pihak pendakwaan yang berhujah pada akhir kes pembelaan bahawa anggapan milikan di bawah s 37(d) dibangkitkan pada hal sebenarnya ia tidak pernah dibangkitkan. Berdasarkan keterangan di hadapan mahkamah, sabitan perayu adalah tidak selamat (lihat perenggan 38–40).

(2) Mahkamah ini tidak mempertimbangkan apa-apa keraguan yang menyebabkan terputusnya rantaian keterangan berkaitan identiti dadah tersebut. Ia adalah tidak betul dan tidak adil bagi perayu membangkitkan dan menghujahkan isu identiti dadah di akhir perbicaraan. Maka, kegagalan hakim perbicaraan untuk mempertimbangkan semula identiti isu dalam pertimbangannya tidak merupakan ketidakadilan (lihat perenggan 37).]

Notes

For cases on miscarriage of justice, see 5(3)*Mallal's Digest* (5th Ed, 2015) paras 5824–5831.

Cases referred to

Lim Pah Soon v PP [2013] 6 MLJ 252; [2013] 8 CLJ 800, CA (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)

Saeid Reza Mohammadi Mohammad lwn Pendakwa Raya [2016] 4 MLJ 22; [2016] 1 LNS 30, MR (folld)

Legislation referred to

Customs Act 1967 s 116A(3)(b)

Dangerous Drugs Act 1952 ss 2, 12(2), 37(d), (da), 39A(2), 39B(1)(a), (2), First Schedule

Evidence Act 1950 s 32(a)

Appeal from: Criminal Trial No 45A-259–11 of 2012 (High Court, Shah Alam)

Hisyam Teh Poh Teik (Teh Poh Teik) for the appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zamani A Rahim JCA:

INTRODUCTION

[1] Daniel Akachukwu Agbanusi, the appellant, was charged with an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the same Act. The charge reads as follows:

> 1) The Amended Charge
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> Bahawa kamu pada 16.4.2012, lebih kurang jam 3.55 petang di Cawangan Pemeriksaan Penumpang 1 (CPP1), Balai Ketibaan Antarabangsa, Terminal Utama Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam Daerah Sepang, di dalam Negeri Selangor Darul Ehsan telah didapati mengedar dadah berbahaya iaitu methamphetamine seberat 459.6 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] At the close of the prosecution's case, the trial judge held that the prosecution had failed to establish a prima facie case against the appellant. The appellant was acquitted and discharged without calling for his defence.

[3] On appeal by the prosecution, this court had set aside the acquittal of the appellant and ordered that his defence be called as charged. Having heard the defence case, the trial judge found him guilty, convicted and sentenced him to death by hanging. Hence, this appeal.

THE PROSECUTION'S CASE

[4] The first customs officer who encountered the appellant at the arrival hall of the main terminal at the Kuala Lumpur International Airport ('KLIA') was the customs officer, Mohd Fairuz bin Johar. He had since passed away. His statement recorded under s 116A(3)(b) of the Customs Act 1967 was tendered by virtue of s 32(a) of the Evidence Act 1950. It was marked as exh P40.

[5] It could be gathered from the statement that Mohd Fairuz had scanned the appellant's luggage bag. He noticed an incriminating image on the monitor

of the scanning machine. He asked the appellant to open the luggage bag. The luggage bag was locked. The appellant opened it.

[6] On opening the luggage bag, Mohd Fairuz noticed a laptop. The laptop was screened and a suspicious green image was seen. Having seen the incriminating image, Mohd Fairuz sought the assistance of customs officers, Sufyan ('PW2') and Aliff, to carry out further inspection.

[7] PW2 carried out further check on the laptop by opening ten screws on the key board underneath it. PW2 found a package wrapped up in a carbon paper. On opening the carbon paper package, SP2 noticed another package tightened by a masking tape. On piercing the package, SP2 noticed crystalline substances trickled out and a field test was conducted. The test confirmed to be positive for the drugs, methamphetamine.

[8] Subsequently, all the belongings of the appellant together with the package of the suspected drugs were seized. All the seized items were handed over to the investigating officer, customs officer Muhammad Farhan bin Jihar ('PW3').

[9] As part of his investigation, PW3 sent the suspected package of drugs to the Chemistry Department Malaysia at Petaling Jaya, for analysis. The government chemist, Dr Vanita a/p Kunalan ('PW1') upon analysis, confirmed that the crystalline substance was methamphetamine, a dangerous drug with a net weight of 459.6g.

[10] Methamphetamine is a dangerous drug listed in the First Schedule of the Act.

THE FINDINGS OF THE TRIAL JUDGE AT THE CONCLUSION OF THE PROSECUTION'S CASE

[11] The extent to which the court requires to evaluate the prosecution's evidence has been canvassed in our courts many a time, including an illuminating decision of the Federal Court in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457.

[12] Another legal principle is that the prosecution is at liberty to call as many witnesses it requires provided that all the ingredients of the offence are proven. It is vital that at the end of the prosecution's case there should not be any *gaps* in the prosecution's case. The credibility of witnesses and sufficiency of the evidence is also of paramount importance. In this case, the credibility of the prosecution witnesses were not seriously challenged.

[13] The defence did not ask the investigating officer, PW3 a pertinent fact contained in the cautioned statement of the appellant. The cautioned statement was never tendered as evidence in court. However, PW3 confirmed that the appellant went to the carousel to fetch his luggage bag, but the bag was placed on the floor, outside the carousel. PW3 knew this, but he did not investigate the matter.

[14] The statement of the appellant showed that the luggage bag containing the drugs was handled by someone else, apart from the appellant. There might have been a reason for removing the luggage bag from the carousel.

[15] It behoves upon the investigating officer to further investigate the reasons for removing the luggage bag from the carousel. For example, by making enquiries from the person(s) who handled or supervised the luggage at the carousel. A more serious concern was whether the contents of the luggage bag had been tampered with. This will go to the issue of possession, including the knowledge of the appellant of the drugs in the luggage bag.

[16] The statement of the late customs officer, Mohd Fauzi was not helpful as Mohd Fauzi failed to notice what happened to the lock and key after the luggage bag was opened. He was paying more attention to the contents of the luggage bag.

[17] The lock and key was never produced in court and none of the enforcement officers could shed light to its whereabout. The statement of Mohd Fauzi could not be challenged and tested as he had passed away. The trial judge did not accept the evidence that the luggage bag was locked and therefore could not have been tampered with.

[18] The trial judge found the failure of the prosecution to plug the gap relating to the removal of the appellant's luggage bag from the carousel was fatal. His Lordship ruled that the prosecution had failed to prove the charge against the appellant on a prima facie basis. The appellant was acquitted and discharged without calling for his defence.

[19] As alluded to earlier, the Court of Appeal had set aside the acquittal of the appellant and ordered that his defence being called as charged.

THE DEFENCE CASE

[20] The appellant gave his evidence on oath, after having explained three options to him.

[21] The appellant reiterated his defence in line with what his defence

counsel advanced during the prosecution's case. Firstly, when he came to the carousel to collect his luggage bag, he found that his bag was already been removed from the carousel. Secondly, the luggage bag was not locked when it was checked by the customs officer, although he had originally locked it.

[22] Another matter raised in his defence was that he denied ownership of the laptop computer in which the drugs were concealed. He, however, admitted that he had brought another laptop which he had filled with gold dust.

[23] In short, it was the appellant's defence that someone had tampered with his luggage bag by opening the lock and replacing the laptop containing the gold dust with the laptop containing the dangerous drugs.

THE FINDINGS OF THE TRIAL JUDGE AT THE END OF THE TRIAL

[24] The defence of the appellant was hard to believe and farfetched. There was no evidence led to show that why any person wanted to carry out the replacement. If such a person really existed he would be waiting at the carousel to pick up the luggage bag belonging to the appellant and thereafter carried out the replacement, without being noticed by the customs officers at the arrival hall of the KLIA.

[25] The defence of the appellant was an afterthought as at no time during the prosecution's case, the appellant raised the matter of another laptop containing gold dust. Neither was there any evidence that the appellant had informed the customs officer of such a laptop. If he had done so, surely there would be a concerted effort to find such an expensive and valuable laptop containing gold dust.

[26] The defence of the appellant was unbelievable and had not raised any reasonable doubt on the prosecution's case.

[27] The trial judge found that the appellant was guilty as charged and convicted and sentenced him to death by hanging.

THE APPEAL

[28] Before us, learned counsel canvassed that the trial judge had misdirected himself, when His Lordship did not appreciate the defence case adequately. At the end of the defence case, the trial judge ruled, inter alia, that the defence could not raise the issue of the difference in weight of the drugs, and this issue was never canvassed before this court in the previous appeal. This approach was

erroneous as the identity issue is always a live issue and bearing in mind that the onus rests with the prosecution to prove its case beyond reasonable doubt.

[29] The identity issue was in fact raised by the appellant in his testimony in the defence case. Learned counsel explained to His Lordship the reasons why the defence tendered both the petition of appeal, exh D41 and the written submission of the prosecution, exh D42: see p 9 of appeal record, Vol 2.

[30] The trial judge ought to have considered this identity issue in his deliberation. The failure to consider amounts to a failure of justice: In the Court of Appeal case of *Lim Pah Soon v Public Prosecutor* [2013] 6 MLJ 252; [2013] 8 CLJ 800, it was said:

> [13] It is well settled rule that the onus of proving everything essential to the establishment of a charge is upon the prosecution. Now, in the context of the present case, it is trite law that one of the essential ingredients of the offence which the prosecution must prove is that the offending drugs exhibits that were actually seized from the car were the very same exhibits that were analysed by SP1 and confirmed to be dangerous drugs and it was for the trafficking of the same drugs that the appellant was charged with: see *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2006] 2 MLJ 197; [2004] 4 CLJ 551. This is a question of fact. Ultimately, for the purpose of s 180(1) and (4) of the CPC, the learned judge was under a legal obligation to arrive at, and make the necessary finding on this factual issue on the basis of the evidence tendered and the submissions made by the parties before him. It follows from this that once the evidence had been place and submissions made, there was a statutory duty cast on the learned judge to make a specific finding of facts on the material discrepancy issue raised by the appellant. These are deep-seated expectations not only from the appellant but also from the prosecution before the learned judge. This is acutely important in a case that attracts the mandatory death penalty prescribed by the DDA as in the present case. For the reason, the duty of the learned judge as a trial judge is to ensure that this legal obligation is complied with so as to avoid 'failure of justice' situations. However, as we indicated earlier, the learned judge never addressed or commented on this issue in his judgment. This was never considered by the learned judge and he failed to direct his mind on this point. In our judgment, the failure on the part of the learned judge to take the evidence regarding the material discrepancy into consideration amounted in effect to a failure to consider a defence which had been put forward: see *Er Ah Kiat v Public Prosecutor* [1965] 2 MLJ 238; [1965] 1 LNS 37. It was the duty of the learned trial judge to consider that defence, no matter how weak it may be: see *Davendar Singh a/l Sher Singh v Pendakwa Raya* [2012] MLJU 321; [2012] 1 LNS 261; [2012] 3 AMR 489. In our view, this is a serious non-direction which amounts to a misdirection by the learned trial judge warranting appellate intervention: see *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 3 CLJ 1; [1993] 2 AMR 1135. The learned judge misdirected himself in that he overlooked and failed to appreciate the importance of this issue as it could raise a reasonable doubt on the identity of the offending drugs and hence could consequently raise a reasonable doubt on the prosecution's case.

[31] Learned counsel contended that this omission amounts to an appealable error warranting appellate intervention.

[32] Further, until the end of the trial, the appellant did not know whether his case was a case of actual trafficking or presumed trafficking. His Lordship ought to have explained to the appellant whether he was facing a case of actual trafficking or presumed trafficking. This is a serious infirmity as the appellant does not know whether he had been convicted for actual or presumed trafficking. The appellant is thus prejudiced. This omission also amounts to a failure of justice.

[33] At the conclusion of the defence case, the prosecution submitted that the trial judge had ruled that the presumption under s 37(d) had been invoked. The prosecution went to submit that the appellant had failed to rebut the said presumption (ie s 37(d)). The prosecution was confused and muddled up. The presumption under s 37(d) of the Act was never invoked.

[34] Before the trial court heard the defence of the appellant, the High Court could have asked clarifications from this court the basis for calling the defence of the appellant. Apart from explaining the three options, no such clarifications were sought from this court.

[35] Alternatively, the appellant argued that this was a case of possession and prayed that the charge be reduced to a lesser offence under s 12(2) of the Act.

OUR DECISION

[36] As alluded to above, at the close of the prosecution's case, the appellant was acquitted and discharged as the trial judge found that a prima facie case had not been made out against the appellant. On appeal, this court ordered that the appellant's defence be called.

[37] Having heard the appellant, the trial judge ruled that the defence could not raise the issue of the disparity in the weight of the drugs at the end of the defence case. In this case, the issue of the identity of the drugs was never canvassed and argued before the trial judge for his consideration. However, the identity issue was raised by the appellant in his testimony which did not find favour with the trial judge. We are aware that the identity issue is always a live issue as the onus rests on the prosecution to prove its case beyond reasonable doubt, save that the drugs have been duly tendered in court, but subsequently gutted by fire or theft or due to other capricious human conduct. In this case, having regard to its earlier appeal to this court which was heard by a different panel, it would be improper and unfair to raise and argue the issue of identity of the drugs at the end of the trial. Thus, a failure by the trial judge to reconsider

the identity issue in his deliberation does not amount to miscarriage of justice. At the end of the day, we are not persuaded by the appellant's argument on the issue of the identity of the drugs. In other words, the court does not entertain any doubt which cause the break in the chain of evidence relating to the identity of the drugs.

[38] However, we find that the appellant is on a firmer ground that he was not made known whether his case was a case of actual trafficking or presumed trafficking. This serious infirmity coupled with the confusion by the prosecution which submitted at the end of the defence case that the presumption of possession under s 37(d) was invoked. The said presumption (ie s 37(d)) was never invoked. The infirmity of this nature can be seen in the recent decision of this court in *Saeid Reza Mohammadi Mohammad lwn Pendakwa Raya* [2016] 4 MLJ 22; [2016] 1 LNS 30 and the authorities cited therein. In that case, the court said *in extenso* as follows:

> [37] Kami beralih kepada alasan rayuan terakhir yang dihujahkan oleh peguambela perayu. Hakim bicara dihujahkan telah membuat dapatan yang *bercelaru* dan tidak menentu dalam pemakaian anggapan statut mengenai elemen milikan di bawah s 37(d) ADB berbanding dengan keterangan langsung. Setelah meneliti penghakiman hakim bicara, kami bersetuju dengan hujahan peguambela. Mengenai elemen milikan, kami mendapati hakim bicara telah membuat dapatan-dapatan yang berikut seperti di ms 349 AR Jld 4:
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> > From the entirety of facts and circumstances, the court is satisfied that the prosecution had proved the second element and the accused had mens rea possession of the drugs.
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> [38] Daripada petikan di atas menjuruskan hakim bicara membuat dapatan elemen milikan telah dibuktikan berdasarkan kepada keterangan langsung tanpa menggunapakai anggapan milikan di bawah s 37(d) ADB. Namun dalam menilai kes pembelaan, hakim bicara telah memakai anggapan di bawah s 37(d) ADB untuk elemen milikan. Di ms 352 AR Jld 4, hakim bicara menyatakan seperti berikut:
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> > However, the burden of defence to rebut the presumption of knowledge is only on the balance of probabilities and to create a reasonable doubt in the prosecution case.
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> [39] Kami bersetuju tidak ada dapatan yang jelas oleh hakim bicara samada elemen milikan telah berjaya dibuktikan melalui keterangan langsung atau melalui anggapan di bawah s 37(d) ADB. Sekiranya hakim bicara menggunapakai anggapan, tiada sebarang dapatan oleh hakim bicara samada pihak perayu telah berjaya mematahkan anggapan tersebut atas imbangan kebarangkalian.
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> [40] Dalam kes *Soorya Kumar a/l Narayanan @ Narayanasamy v Public Prosecutor* [2011] 5 MLJ 774; [2009] 6 CLJ 257, Ahmad Maarop JCA (sekarang HMP) telah memutuskan:
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> > [18] At the conclusion of his submission before us, commenting on the judgment in the court below, the learned counsel for the accused said that the

learned trial judge was *confused*. We agree. The learned judge seriously misdirected himself and leaves us in serious doubt as to whether at the close of the prosecution's case *he was relying on the statutory presumption under s 37 of the Act or on the proof of actual act of trafficking as defined under s 2 of the Act. In our view the benefit of the doubt must be given to the accused*.

[41] Dalam kes *Ooi Hock Kheng v Public Prosecutor* [2014] 5 MLJ 585, Azhar Mohamad JCA (sekarang HMP) mengesahkan prinsip undang-undang yang sama, seperti berikut:

There is another reason why we had allowed this appeal. At the conclusion of the case for the prosecution, the learned JC had invoked s 37(d) of the DDA to prove possession of the ketamine in the plastic bag by the appellant. The statutory presumption under s 37(d) is a rebuttable presumption. For this reason, *it is incumbent on the learned JC to consider at the end of the whole case whether the presumption that he invoked had been rebutted on a balance of probabilities. A reading of the judgment of the learned JC show that he had failed to direct his mind on this point. This is a serious misdirection as the law requires the learned JC to make such a finding when he resorted to the presumption under s 37(d) of the DDA*.

[42] Dan dalam satu kes yang lain, *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408; [2014] 4 CLJ 406, mahkamah ini sekali lagi mengesahkan prinsip undang-undang yang sama. Di ms 416 kes tersebut, diputuskan seperti berikut:

[18] The second ground raised by learned counsel for the appellant was on the presumptions. The complaint was not on the invocation of double presumption of possession and trafficking under s 37(d) and (da) of the Act respectively, but the complaint was the manner the learned trial judge handled the presumptions.

[19] As borned out by the passages in the grounds of judgment quoted above, the learned trial judge had invoked both presumptions under s 37(d) and (da) in the alternative. In this regard, the submissions of learned counsel was that the approach taken by the learned trial judge was wrong. *The learned trial judge, submitted learned counsel, must make a finding as to which presumption that was relied upon as there has to be a certainty as to the presumption, before defence is called*. Related to this complaint is the failure of the learned trial judge to make a ruling at the end of the defence case as to whether the appellant had rebutted the presumption.

[20] It cannot be denied that the learned trial judge had adverted to both presumptions under s 37(d) and (da) and also to s 2 of the Act without electing whether the appellant was found to be in actual possession of the drugs and was presumed to be trafficking under s 37(da) or whether the appellant was presumed to be in possession of the drugs under s 37(d) and was found to be trafficking under s 2 of the Act. And if the learned trial judge had resorted to the presumption in calling the defence, the law requires that that the learned trial judge apply the test of balance of probabilities in considering whether the appellant had rebutted the presumption: see *Public Prosecutor v Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113. We find no such application of the test of balance of probabilities by the learned trial judge.

[21] In our view, the approach of not electing or making a finding on which presumption that was invoked but by merely relying on the alternative, is most undesirable. It reflects the uncertainty on the part of the trial judge to make a finding. The trial judge ought to make the necessary finding ie whether it was actual or presumed possession and whether it was presumed or actual trafficking based on the evidence before her. We are further of the view that it is important that such a finding be made as it impacts the burden place on the defence.

[22] In this regard we echo the views of Augustine Paul J (as His Lordship then was) in the case of *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649:

> It must first observed that reliance on the presumption provisions where there is available evidence of the facts to be presumed will be unfavourable to the accused. This is because where the court relies on a statutory provision relating to a presumption of law like the presumption provisions it is bound to take the fact as proved until evidence to the contrary is given, on a balance of probabilities, to disprove it: see *PP v Yuvaraj* [1969] 2 MLJ 69*; Nagappan Kuppusamy v Public Prosecutor* [1988] 2 MLJ 53. This results in a legal burden imposed on an accused person though it is not illegal. Failure to discharge the burden, even where a reasonable doubt as to guilt exists, will be followed by conviction: see *State v Mello & Anor* [1999] 1 LRC 215. However, if the court had acted on the available evidence in proof of the relevant ingredients without resorting to presumptions there is only an evidential burden on an accused person to raise a reasonable doubt. This indiscriminate use of presumptions when there is evidence of the facts to be presumed will be unfavourable to the accused as it will place a heavier burden on him which could have been avoided. Fairness to the accused therefore demands that the presumption provisions are used only when there is no evidence of the facts to be presumed.

[23] In the instant case, it is our judgment that the failure of the learned trial judge to make a finding as to which presumption was relied upon for possession and trafficking and the failure to consider whether the appellant had rebutted the presumption, amounts to a misdirection by way of non-direction which has prejudiced the appellant.

[43] Kami bersetuju telah berlaku salah arahan (*mis-direction*) yang serius oleh hakim bicara dalam kes ini kerana ketidakarahan (*non-direction*) mengenai elemen milikan, salah satu elemen terpenting dalam pertuduhan terhadap perayu. Salah arahan ini telah mendatangkan prejudis dan kegagalan keadilan kepada perayu mengenai beban pembuktian yang dikenakan terhadap pihak pembelaan samada untuk menimbulkan keraguan yang munasabah atau untuk mematahkan anggapan milikan atas imbangan kebarangkalian.

[44] Kami mendapati sabitan terhadap perayu tidak selamat. Sabitan oleh hakim bicara di bawah s 39B(1)(a) ADB diketepikan dan digantikan dengan sabitan di bawah s 39A(2) ADB. Selepas mendengar pihak-pihak, kami menjatuhkan hukuman 18 tahun penjara ke atas perayu berkuatkuasa sejak tarikh ditangkap dan sepuluh sebatan rotan.

[39] The principles enunciated in the above cases are equally applicable to this case where the trial judge did not make known whether the appellant's case was premised on actual trafficking under s 2 of the Act or presumed trafficking under s 37(da) of the same Act. And whether the appellant had rebutted the presumption.

[40] In conclusion, the appellant may consider himself fortunate for the lapses of the trial judge in writing his ground of judgment. Based on the evidence before the court, we were of the view that his conviction was not safe. We therefore minded to reduce the charge to a lesser offence of possession of drugs under s 12(2) of the Act, punishable under s 39A(2) of the same Act.

[41] We, therefore, unanimously set aside the conviction and sentence of death under s 39B(2) of the Act imposed by the High Court on the appellant, and in its place we substituted with an imprisonment term of 20 years commencing from date of arrest ie 16 April 2012 and ten strokes of whipping.

Appeal allowed, conviction for trafficking and sentence of death set aside, appellant convicted on a lesser offence of possession under s 12(2) of the DDA and sentenced to 20 years jail plus ten strokes of whipping.

Reported by Ashok Kumar